

MINUTES

**MONTANA SENATE
58th LEGISLATURE - REGULAR SESSION**

COMMITTEE ON JUDICIARY

Call to Order: By **CHAIRMAN DUANE GRIMES**, on February 3, 2003 at 10:00 A.M., in Room 303 Capitol.

ROLL CALL

Members Present:

Sen. Duane Grimes, Chairman (R)
Sen. Dan McGee, Vice Chairman (R)
Sen. Brent R. Cromley (D)
Sen. Aubyn Curtiss (R)
Sen. Jeff Mangan (D)
Sen. Jerry O'Neil (R)
Sen. Gerald Pease (D)
Sen. Gary L. Perry (R)
Sen. Mike Wheat (D)

Members Excused: None.

Members Absent: None.

Staff Present: Judy Keintz, Committee Secretary
Valencia Lane, Legislative Branch

Please Note. These are summary minutes. Testimony and discussion are paraphrased and condensed.

Committee Business Summary:

Hearing & Date Posted: HB 53, 1/29/2003; HB 54, 1/29/2003;
SB 283, 1/29/2003
Executive Action: HB 53, SB 274, HB 15, SB 263, HB 54

HEARING ON HB 53

Sponsor: REP. BRAD NEWMAN, HD 38, BUTTE

Proponents: Beth Satre, Montana Coalition Against Domestic and Sexual Violence
Ellen Donahue, Director of the Safe Space Domestic Violence and Sexual Assault Program
Beta Lovitt, Friendship Center Board of Directors and Crisis Line Advocate
Jim Smith, Montana Sheriffs and Peace Officers Assoc.

Opponents: None

Opening Statement by Sponsor:

REP. BRAD NEWMAN, HD 38, BUTTE, introduced HB 53, the victim's rights bill. He remarked the last paragraph of the bill involves notification to victims. Current law provides whenever a person who is accused of partner or family member assault, stalking, or violation of a protection order, is released from custody the court shall notify the victim of that release as soon as possible. The proposed amendment would strike the word "court" and insert "detention center". This amendment is made to protect victim's rights. The court system works 8:00 a.m. to 5:00 p.m. Crimes occur 24/7 and the sheriff's officers work and detention centers are open 24/7. If an offender is arrested and posts bail on a Friday evening or a Saturday morning, the court would not be in session until the following Monday. If this happens on a weekday evening, the court is not in session until the following morning. Placing the notice requirement on the detention center is a more effective way to serve the victims who, through no fault of their own, have been brought into the criminal process. The burden would be placed on law enforcement. The Montana Sheriff's and Peace Officers Association rose in support of this bill in the House Judiciary Committee. This requirement will create extra work for law enforcement and detention centers but the cost is minimal when compared to saving a life.

Proponents' Testimony:

Beth Satre, Montana Coalition Against Domestic and Sexual Violence, presented her written testimony in support of HB 53, **EXHIBIT(jus23a01)**. She also provided written testimony from Justice of the Peace, Wallace A. Jewell, **EXHIBIT(jus23a02)**; Edmund S. Krasinski, Victim/Witness Advocate for Jefferson

County, **EXHIBIT(jus23a03)**; and Judy Wang, Assistant Missoula City Attorney, **EXHIBIT(jus23a04)**.

Ellen Donahue, Director of the Safe Space Domestic Violence and Sexual Assault Program, rose in support of HB 53. In the last 13 or 14 years she has been asked daily how a victim can be kept safe. House Bill 53 is a component to answer the question. Partner and family member assault and stocking is a pattern crime and not a one-time occurrence. When the accuser is released from jail, they are looking for a particular person and will find that person. Immediate notification to the victim gives the victim options on whether or not to go to a shelter, get an order of protection, change the locks on their doors, etc. These crimes are crimes of power and control. Power and control needs to be given back to the victims.

Beda Lovett, Friendship Center Board of Directors and Crisis Line Advocate, remarked HB 53 addresses a small matter but it is important to do whatever we can to give the best possible protections to victims of domestic violence.

Jim Smith, Montana Sheriffs and Peace Officers Assoc., rose in support of HB 53. Sheriffs offices handle the detention centers around the state. This bill will add workload to those offices but they are willing to accept that workload to help improve services to victims. On page 2, (3), the language is discretionary but does require them to make reasonable attempts to notify.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. JERRY O'NEIL asked if the detention centers would have a copy of the order so they would know who to notify. **REP. NEWMAN** affirmed when bail was set the information would be communicated to the detention center. When a victim has contact with the investigating officers and the court system, contact information is provided.

Closing by Sponsor:

REP. NEWMAN closed on HB 53.

HEARING ON HB 54

Sponsor: **REP. BRAD NEWMAN, HD 38, BUTTE**

Proponents: **Ali Bovington, Assistant Attorney General,
Department of Justice
Beth Satre, Public Policy Specialist for the
Montana Coalition Against Domestic and Sexual
Violence
Jim Smith, Montana Sheriffs and Peace Officers
Assoc., and Montana County Attorneys Assoc.**

Opponents: **None**

Opening Statement by Sponsor:

REP. BRAD NEWMAN, HD 38, BUTTE, introduced HB 54. He commented that criminals have computers and it is necessary for the state to keep up with this technology. This bill adds the phrase "electronic communication" to the means by which various criminal offenses may be committed. The crimes specific to HB 54 include stalking, child pornography, defamation, and privacy in communications. If a stalker resides in a different state and sends a series of harassing, intimidating, or threatening e-mails to the subject of the stalking, this could be prosecuted under the law. The bill also provides for the proper venue for the prosecutions. Venue would be proper either in the county of origin or in the county of receipt.

Proponents' Testimony:

Ali Bovington, Assistant Attorney General, Department of Justice, rose in support of HB 54. This bill would bring those criminal offenses which include an element of communication or transmittal of information up-to-date with the methods of communication available today.

Beth Satre, Public Policy Specialist for the Montana Coalition Against Domestic and Sexual Violence, rose in support of HB 54 and provided written testimony from **Marty Lambert, Chief Deputy Gallatin County Attorney, EXHIBIT(jus23a05);** and **Judy Wang, Missoula Assistant City Attorney, EXHIBIT(jus23a06).**

Jim Smith, Montana Sheriffs and Peace Officers Assoc., and Montana County Attorneys Assoc., rose in support of HB 54.

{Tape: 1; Side: B}

Opponents' Testimony: **None**

Questions from Committee Members and Responses:

SEN. MCGEE asked for an explanation of "harassing" e-mails or faxes. **REP. NEWMAN** clarified the statutory language is in case law. This would include repeat conduct that serves no purpose other than to harass or bother the recipient. The language would be short of threatening words and may include they know the person has changed jobs, they know where they are working, and/or they have been watching the subject.

SEN. MANGAN remarked as technology evolved, it may be necessary to make the law more specific. This could include adding wireless or cellular phones. **REP. NEWMAN** maintained that it is necessary to protect the defendant's due process rights as well as explain the prohibited conduct. By not including electronic communications in the statutes, we run the risk of the defendant claiming the action was not expressly prohibited. If a communication or device has been left out, he would consider adding it.

SEN. O'NEIL noted that he had received 20 e-mails which were an advertisement and were all the same. This was harassing, it was sent by computer, and included more than one incident. He questioned whether these e-mails would qualify for stalking under the bill. **REP. NEWMAN** explained when they are notified a person believes they are being stalked or harassed, they mandate the victim, prosecutor, or sheriff's office notify the communicator the conduct is unwanted and unwarranted. If it does not stop the sender will face action. An advertisement or a single e-mail would not fit under the definition of stalking in the statute. This bill adds one means of committing the offense.

SEN. CROMLEY remarked certain items were not listed to include: a pager, wireless message service, and infrared communication. He wondered whether or not the bill would work just as well without the amount of specificity included. He also questioned whether the word "telegraph" should be reinserted in Section 1. **REP. NEWMAN** explained the bill drafter was of the opinion the original proposal was not specific enough and suggested the language on page 6. The House Judiciary Committee was comfortable with specifically listing the means of communication. Current statute allows for prosecution for in-person, telephone or mail conduct or by other action, device, or method.

SEN. WHEAT asked whether consideration had been given to defining electronic communication in the definition section of the criminal code. **REP. NEWMAN** noted that they had not but this may be a different way to handle it. He was not opposed to the consideration.

SEN. O'NEIL suggested using the language, "transfer of communication by any method". This would pick up all methods.

REP. NEWMAN claimed the intent was not to restrict the prosecution or the enforcement of victim's rights. The language, "other action, device, or method" remains in existing law. His intent is not to restrict the methods.

Closing by Sponsor:

REP. NEWMAN closed on HB 54.

HEARING ON SB 283

Sponsor: **SEN. MIKE WHEAT, SD 14, BOZEMAN**

Proponents: **Ken Kasting, Attorney**

Opponents: **None**

Opening Statement by Sponsor:

SEN. MIKE WHEAT, SD 14, BOZEMAN, introduced SB 283. He commented the bill cleared up a conflict in the venue statutes. It also addressed agreements reached in mediation involving family law. The dissolution venue statute, 25-2-118, states the proper place to file a dissolution action is the county where the petitioner resides 90 days preceding the filing of the action. The dissolution jurisdiction statute, 40-4-104, states the jurisdiction of dissolution action is satisfied if one of the parties is domiciled in the state for 90 days preceding the making of the findings. One statute states preceding the filing of the action and the other statute states preceding the making of the findings.

{Tape: 2; Side: A}

This bill makes 25-2-118 consistent with 40-4-104. It would require a person contemplating a divorce action to have resided in Montana and in a particular county for 90 days before an action is filed.

In 40-4-302, a mediator is allowed to exclude a party's lawyer from the mediation sessions. Section 40-4-305, provides an agreement reached in mediation may not be submitted to the court if either party objects. The proposed legislation would allow the parties full access to their attorneys throughout the mediation process and allow attorneys to be present with clients at all times during the mediation process. Either party would be allowed to submit to the court a signed agreement, reached in

mediation. Section 40-4-305 would be consistent with signed dissolution agreements set out in 40-4-201 and other non-dissolution mediation agreements as set out in 26-1-813. This legislation would allow the party to have his or her party present during all stages of the mediation process. The agreement reached in mediation and reduced to a signed document would be treated as any other settlement agreement in dissolution actions. The court would review it for fairness and conscionability.

Proponents' Testimony:

Kent Kasting, Attorney, noted the bill makes the two statutes consistent and requires an individual contemplating filing a divorce action to have resided in Montana for three months before the filing of the action and also to have resided in the county for three months prior to the filing of the action. Attorneys would like to be present during all stages of the mediation proceeding so they can advise clients as to whether or not they are agreeing to something that is legal and/or in their best interests. This bill would make the change of not allowing the mediator to exclude counsel from mediation proceedings. The client would not be prohibited from telling his or her lawyer to leave the room.

The original statute contemplated an agreement reached during mediation. It goes on to state the agreement may not be presented to the court if a party objects. This bill requires a mediated agreement to be written and signed by the parties. It is then placed on the same footing as any other settlement agreement in a dissolution action.

Opponents' Testimony: None

Questions from Committee Members and Responses:

SEN. MCGEE questioned why the decision was made to allow the mediator to exclude the attorney from the mediation process.

SEN. WHEAT believed the intent was to move the mediation process along. This has not been successful. **Mr. Kasting** remarked mediation is a voluntary process. Any party can leave the mediation process and turn the matter over to the court. Under the statute, mediators do not need to be trained in legal matters. An illegal action may take place in terms of resolving a dissolution action. Having a lawyer advise his or her client in terms of those issues, is most important. The legislation would speed up the process and eliminate future conflicts.

SEN. PERRY asked why the mediator and the parties were not allowed an option of excluding attorneys from the mediation sessions. **Mr. Kasting** noted there is no requirement in the mediation statutes for a party to have counsel. The present statute states the mediator may exclude counsel. If his client did not want him present at a mediation session, he would defer to his client, assuming it was in his or her best interest. He was not aware of any judicial proceedings which would allow the facilitator to exclude or prevent a party from having counsel present during the proceedings.

SEN. MANGAN raised a concern about the language which was stricken on page 2. **SEN. WHEAT** maintained people involved in a dissolution proceeding need advice of counsel. If the client wants his or her lawyer to be present, this is an important matter. The mediation process is critically important in family law situations.

CHAIRMAN GRIMES asked whether the family law section of the State Bar Association had been contacted in regard to this legislation.

SEN. WHEAT noted Mars Scott, Chairman of the Family Law Committee of the State Bar Association, had been contacted. He did not see any problems with the concept in the bill. **Mr. Kasting** remarked that he had had a conversation with Mr. Scott in regard to the bill and he did not have any problem with it. The Family Law Section of the State Bar has been accurately informed about the legislation.

SEN. O'NEIL questioned whether the legislation would apply to mediation proceedings not involving family law. **Mr. Kasting** explained the statute being changed was entitled, "Family Law Mediation". The statute dealing with mediation anticipates and contemplates written agreements being presented to the court. The portion of the mediation statute being amended would simply make mediated agreements in dissolution actions consistent with the general mediation statute. He added the optimum situation is to have parties and counsel sitting across the table from one another and have the mediator serve as a facilitator to open lines of communication and come up with ideas to settle their problems. Sometimes in family law matters, the vindictiveness reaches a point where having parties across the table from one another is not workable. As a mediator, he will separate the parties and proceed with shuttle diplomacy. It is important to have counsel present to advise the party as to whether or not what they are agreeing to is in their best interest as well as whether or not a court would approve it.

SEN. O'NEIL asked whether the venue for filing a dissolution would be changed. **Mr. Kasting** claimed the language in the venue

statute addressed the county where the petitioner resided for three months prior to the commencement of the action. The change in the venue statute would involve changing the word "commencement" to "filing". If parties agree to change venue, they can do so. If the parties do not agree, the place to file the action is the county where the petitioner resided for three months prior to the filing or commencement of the action. The jurisdictional statute is changed to state it is necessary to reside in Montana for three months prior to filing the action. This makes the two statutes consistent.

SEN. O'NEIL asked whether it would be permissible to have venue in the county where the respondent resided. **Mr. Kasting** noted this could be changed to include either party.

{Tape: 2; Side: B}

Closing by Sponsor:

SEN. WHEAT claimed the two issues the bill addressed needed to be resolved. The first issue is the conflict between the venue statute and the family law statutes relating to the filing of an action. It is also important to consider the amendments to the mediation process.

EXECUTIVE ACTION ON HB 53

Motion/Vote: **SEN. MCGEE** moved that HB 53 BE CONCURRED IN. Motion carried unanimously.

EXECUTIVE ACTION ON COMMITTEE BILL

SEN. CROMLEY explained applicants for the State Bar are required to be fingerprinted in order to complete a background check. The State Bar operates under the auspices of the Montana Supreme Court but the FBI considers the State Bar to be a semi-private organization. The policies and procedures of the FBI have a conflict with our current statute. The proposed amendment would state when fingerprint records are returned from the FBI they would go to the Montana Supreme Court and its Commission on Character and Fitness. This is a procedural issue.

Motion/Vote: **SEN. CROMLEY** moved that the COMMITTEE BILL BE DRAFTED. Motion carried unanimously.

EXECUTIVE ACTION ON SB 274

Motion: **SEN. MCGEE** moved that SB 274 DO PASS.

Discussion:

SEN. O'NEIL remarked that originally he believed the bill would allow the state to review his daughters' medical files to see if they have ever had an abortion. It also looked like it would allow the state to ban birth control pills and other drugs related to the conception of children. He is strongly in favor of parental notification if a young girl is pregnant. It may be in the state's interest to notify an expectant lady of the consequences of abortion. He has reviewed these issues with attorneys and is comfortable voting in favor of the bill.

Vote: Motion carried 5-4 with **CROMLEY, MANGAN, PEASE, and WHEAT** voting no.

EXECUTIVE ACTION ON HB 15

Motion: **SEN. CROMLEY** moved that HB 15 BE CONCURRED IN.

Substitute Motion: **SEN. O'NEIL** made a substitute motion that HB 15 BE INDEFINITELY POSTPONED.

Discussion:

SEN. WHEAT claimed it was necessary to have consistency in the definitions of elder abuse under the criminal statutes. The prosecutors who instruct juries in elder abuse cases need to use consistent language.

SEN. MCGEE remarked if the motion failed, he would provide an amendment to clarify "bodily injury" on line 19, page 1. The opponents could use the laundry list to help clarify their issues.

CHAIRMAN GRIMES asked **SEN. MCGEE** if he intended to amend the term "mental injury" on line 6. **SEN. MCGEE** explained his intent was to amend line 19, page 1, to state, "Bodily injury means physical pain, illness, or other impairment of physical condition and includes mental illness or impairment."

SEN. CROMLEY found a problem in 45-2-101, which is not addressed in the bill.

SEN. O'NEIL claimed nurses aides working in nursing homes would be likely to cause physical pain to the elderly patients. In the past, the statute held there needed to be a physical sign or indication of abuse. When his mother was on her death bed, they

did things for her that put her in physical pain. The definition of physical pain is too vague.

Vote: Motion carried 7-2 with MANGAN and WHEAT voting no.

EXECUTIVE ACTION ON SB 263

Motion: SEN. WHEAT moved that SB 263 DO PASS.

Discussion:

CHAIRMAN GRIMES proposed a conceptual amendment to address an older child. He requested more time to develop this amendment.

SEN. CURTISS requested that additional weight be given the testimony of the investigating officer. This would be the best way to determine what actually took place.

SEN. WHEAT withdrew his motion.

{Tape: 3; Side: A}

EXECUTIVE ACTION ON HB 54

SEN. WHEAT suggested using a definition in the definition section of the criminal code which addressed electronic communication rather than placing it into various statutes.

MS. LANE raised a concern in regard to drafting an amendment addressing electronic communication that would include wireless communication, cable, fiber optics, etc. She further added the definition section being addressed is a long section. It would be necessary to amend any other sections that might refer to a subsection of that section.

SEN. O'NEIL suggested changing the language to "any method of contacting the alleged or stalked person".

ADJOURNMENT

Adjournment: 11:45 A.M.

SEN. DUANE GRIMES, Chairman

JUDY KEINTZ, Secretary

DG/JK

EXHIBIT (jus23aad)